1968

Central Finance Co., Inc. v. L. Udell Kynaston, aka Lawrence Udell Kynaston, and La Rue M. Kynaston, aka Ruth Larue Kynaston, Is Wife : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

CENTRAL FINANCE CO., INC., Plaintiff and Respondent, -vs- L. UDELL KYNASTON, aka Lawrence Udell Kynaston, and LA RUE M. KYNASTON, aka Ruth LaRue Kynaston, his wife, Defendants and Appellants.	Case No. 11303

RESPONDENT'S BRIEF

Appeal from Judgment of the Second District Court for Davis County
Hon. Parley E. Norseth, Judge

E. J. SKEEN
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AUTHORITY CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

CENTRAL FINANCE CO., INC., Plaintiff and Respondent, -vs- L. UDELL KYNASTON, aka Lawrence Udell Kynaston, and LA RUE M. KYNASTON, aka Ruth LaRue Kynaston, his wife, Defendants and Appellants.	Case No. 11303

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is a suit on the appellants' promissory note

DISPOSITION IN LOWER COURT

The respondent was given a money judgment against the appellants who did

not appear in person or by counsel at the trial, and the trial court denied the appellants' motion to set aside the judgment on the ground of lack of notice of the trial date.

RELIEF SOUGHT ON APPEAL

The appellants seek reversal of the order denying their motion to set aside the judgment.

STATEMENT OF FACTS

The respondent does not agree with the appellants' statement of fact.

On pages 3 and 4 of the appellants' brief a letter dated January 29, 1968, advising Mr. Bean of the trial setting is reproduced. It should be noted that Mr. Bean did not respond to this letter either approving or disapproving of the

trial date. (R. 14).

The statements on pages 5 and 6 of the appellants' brief that contacts were made by telephone with the County Clerk's Office by the appellants' counsel, and that one Afton Udall, deputy clerk, advised counsel for the appellants that the case was not set for trial on March 21, 1968, are unsupported by any reference to the record, and are in conflict with the clerk's own record appearing on an unnumbered page in the record following page 8 as follows:

"Thursday, March 21

Swan or Norseth

#12954	Non-Jury	
Gallegos		Pete N. Vlahos
	Default	
vs		
	Tues. 26	
Gallegos		Alfred E. Van Wagenen

#13142 Non-Jury

LuAnne B. Daley S. Mark Johnson

vs Swan

Searle Ralph Daley Layne B. Torbn

#11804-11805

Central Fin. Skeen

vs Norseth

Kynaston - Wm.
Mayfield David Bean

A copy of the page from my Trial Calendar book for Thursday, March 21, 1968.

Barbara B. Snow"

As a supplement to the appellants' statement of fact, the respondent quotes from page 1 of the transcript of the trial:

> "THE COURT: ". . .The record will show in this case that the trial setting was for March 21, 1968, at 10:00 o'clock a.m.; that both parties, the plaintiff and the defendants, were notified by the clerk's office and by Judge Thornley K. Swan of the trial setting; that the plaintiff appeared in person and by

his attorney, E. J. Skeen, the defendants failed to appear in person or by their attorney. That it is now 10:45 o'clock a.m. The plaintiff is directed to proceed with the evidence in his case. (Emphasis Added). (Tr. 1).

STATEMENT OF POINTS

1. The appellants have not proved mistake, inadvertance, surprise, excusable neglect or other ground for setting aside the judgment.

2. The failure of appellants to show a meritorious defense defeats the motion.

ARGUMENT

1. THE APPELLANTS HAVE NOT PROVED MISTAKE, INADVERTANCE, SURPRISE, EXCUSABLE NEGLECT OR OTHER GROUND FOR SETTING ASIDE THE MOTION.

The appellants' argument is that

the clerk failed to give notice of the trial setting and that upon inquiry at the clerk's office the appellants' counsel was told that the case was not on the calendar for March 21, 1968. Appellants argue also that the attorney for respondent wrote a letter on January 29, 1968, to appellants' attorney telling him that the case had been set for trial subject to clearance as to the suggested date and that the date had not been "cleared". The record is undisputed that the letter has never been answered. (R. 14). The letter, although quoted in the brief, is not in the record.

Certain facts are clear in the record. The case was set for trial on March 21, 1968. It was assigned to Judge Norseth. See excerpt from the clerk's trial calendar quoted above.

The trial judge satisfied himself that notice of the trial setting was given by both the clerk and by Judge Swan and stated as much in the record. (Tr. 1). The affidavit of Nancy Bishop shows that upon two inquiries at the clerk's office shortly before the trial she was informed that the trial was set for March 21.

There is no proof in the record to the effect that Judge Swan did not give notice as stated by Judge Norseth into the record and no proof that, or even a statement that, the appellants' counsel did not actually know of the trial setting. The appellants' argument under Rule 60(b) Utah Rules of Civil Procedure is that the clerk was required to give written notice by the court rules and failed to do so. There is no proof in the record that the clerk failed to give

notice and that Judge Norseth was wrong.

Certainly the letter of January 29, 1968, notifying appellants' attorney of the setting put him on notice and imposed on him an obligation to either object to, or approve the trial date. As a matter of common professional courtesy the letter should have been answered. The ignoring of the communication by appellants' attorney definitely does not constitute excusable neglect.

The argument is made that Mr. Bean wrote a letter dated March 19, 1968, to respondent's attorney "assuming there would be no trial and offering to work for an early trial date." (App. Brief, p. 8), which indicated there had been no trial date. The letter is not in evidence and this court has nothing before it to enable it to determine the valid-

ity of the assumption. Furthermore, the evidence is clear that the letter was not received until after the trial. (R. 14).

What constitutes excusable neglect depends on the circumstances of each case.

> "In order to be entitled to have a regularly entered default judgment opened or vacated, the defaulted party should establish the facts on which he relies as grounds for relief by a preponderance of the evidence or by clear, convincing and satisfying proof."
>
> 49 C.J.S., p. 667

As indicated above, the evidence is clear that the case was on the trial calendar and the letter of January 29, is proof of notice of the setting.

There is no proof by affidavits of personnel in the clerk's office or otherwise that no notice of hearing was

sent by the clerk and copies of the various letters referred to in the brief are not in the record. The only attempt at proof of lack of notice is the verified motion. We submit that there is insufficient showing by this record of any valid excuse for not appearing in court at the time set.

2. THE FAILURE OF APPELLANTS TO SHOW A MERITORIOUS DEFENSE DEFEATS THE MOTION.

The law is well settled that a motion to set aside a judgment must be supported by a showing that the moving party has a meritorious defense.

49 C.J.S., pp. 642-644

It is also the rule that the facts constituting the defense must be set forth in the motion to set aside a judgment.

49 C.J.S., p. 643.

The appellants have made no showing whatever of a meritorious or any defense to the complaint. Under the law set out above this failure to make such a showing is sufficient to support the trial court's order denying the motion to set aside the judgment. There was no abuse of discretion.

Respectfully Submitted,

E. J. SKEEN

Attorney for Respondent